UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WAYNE M. JOHNSON,	***)***	
	)	
Plaintiff[1]	***)***	
	)	
v.	***)***	***Docket No. 97-214-P-C***
	)	
KEYCORP, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM DECISION ON PLAINTIFF'S MOTION TO STRIKE

The defendants, KeyCorp; Key Bank of Maine; Key Bank USA, N.A.; Lambert, Coffin, Rudman & Hochman; Christopher Roney; Dennis Hagemann; Robert Burgess; and Richard Molyneux move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss all thirteen counts of the complaint that initiated this action arising out of a bank loan.[2] The plaintiff has filed with his opposition to the

[1] The complaint is captioned "Wayne M. Johnson, et al. Plaintiffs," and occasionally refers to plaintiffs, but it never identifies any plaintiff other than Wayne M. Johnson, who appears *pro se*. The defendants have not made an issue of the failure of the complaint to comply with Fed. R. Civ. P. 10(a), but the failure of the complaint to include the name of any plaintiff other than Wayne M. Johnson in the title, or to separately identify any such plaintiff in its body, means that this court will treat Wayne M. Johnson as the sole plaintiff in this action.

[2] KeyCorp has filed an answer but is not listed in the caption of the defendants' motion to dismiss. All of the defendants are represented by a single counsel in this action and the motion states that the "defendants" move to dismiss the complaint. Motion to Dismiss (Docket No. 15). The complaint asserts no claims against KeyCorp that differ from those asserted against the other defendant banks, Key Bank of Maine and Key Bank USA, N.A. Under the circumstances, I assume that KeyCorp is included in the motion to dismiss.

motion to dismiss a motion to strike, although he does not specify what it is that he asks the court to strike. Assuming that it addresses the motion to dismiss in general, I deny the motion to strike. I recommend that the court grant the motion to dismiss in part and deny it in part.

I. Applicable Legal Standard

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). However, the court need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to allegations in the complaint; the court may not consider factual allegations, arguments and claims that are not included therein. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

II. Analysis

The following "well-pleaded" facts appear in the complaint and are relevant, or at least potentially relevant, to the motion to dismiss. In February 1995 the plaintiff received a telephone call from defendant Burgess,[3] who inquired about a check from the plaintiff and promised to advise him

[3] Defendants Hagemann, Burgess and Molyneux are apparently current or former employees of one or more of the Key Bank defendants, although this fact is not altogether clear from the (continued...)

regarding future payments. Complaint (Docket No. 1) ¶ 23. Defendant Burgess did not contact the plaintiff again. *Id.* On or about May 18, 1995 the plaintiff entered into a "Stipulation to Judgment" with defendant Key Bank of Maine. Complaint, Exh. A. At the same time, the plaintiff entered into a written workout agreement with defendant Key Bank of Maine which recited, *inter alia*, that the plaintiff had defaulted on a mortgage loan from Key Bank of Maine relating to property located at 5 Spar Circle, Yarmouth, Maine. Complaint, Exh. B at 1, 2. The workout agreement required the plaintiff to list the subject property for sale. *Id.* at 8. The property is apparently the plaintiff's residence. Complaint ¶ 7. The plaintiff and Key Bank of Maine had an additional collateral agreement that is not reflected in the workout agreement, *id.* ¶ 10, which Key Bank of Maine breached by failing to provide the plaintiff with an amortization schedule or regular monthly payment notices, *id.* ¶ 11. The plaintiff made payments in excess of the amounts required under the workout agreement, *id.* ¶ 13, although the checks representing these payments apparently were not cashed, *id.* ¶ 15. The plaintiff complied with the workout agreement but Key Bank of Maine refused to return the stipulation to judgment to him as required by the terms of the agreement. *Id.* ¶¶ 6, 12.

On March 13, 1995, during negotiation of the workout agreement, the plaintiff requested a one or two day delay in a scheduled meeting due to considerable pain and discomfort he was experiencing because of his leg prosthesis. *Id.* ¶ 20. Despite the fact that they knew that appearing at the meeting without his prosthesis and on crutches would upset and embarrass the plaintiff, all of the defendants refused the request and threatened to foreclose on the property if the plaintiff did not attend the meeting. *Id.* The plaintiff attended the meeting in downtown Portland and was humiliated by having

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[3](...continued)
complaint. Defendant Roney is an attorney formerly associated with defendant Lambert, Coffin, Rudman & Hochman, then known as Black, Lambert, Coffin & Rudman. Complaint, Exh. C.

to appear in public without his prosthesis. *Id*. ¶¶ 20-21. During the meeting, the pain in his stump became unbearable, and the plaintiff cried out and put his head down on the table. *Id*. ¶¶ 20, 22. The plaintiff looked up to see defendant Hagemann "turn to Defendant Rony [sic] and smirk." *Id*. ¶ 22. The plaintiff was outraged and embarrassed by this action. *Id*.

Key Bank USA, N.A. agreed, at some unspecified time, to a six month deferment of all payments due from the plaintiff. *Id*. ¶ 16. The plaintiff requested additional funds from one of the Key Bank defendants to pay overdue taxes on the property and make repairs. *Id*. ¶ 17. This request was refused. *Id.* An officer of Key Bank USA, N.A. agreed to help the plaintiff "regain[] [his] credit rating." *Id*. ¶ 18.

The plaintiff is currently making payments of $300 per month, following the six month deferment period, but the "Defendants have refused . . . to agree upon a payment schedule that Plaintiffs [sic] can reasonably afford." *Id*. ¶ 44. The plaintiff encountered defendant Molyneux, then president of defendant Key Bank of Maine, at an unrelated meeting at an unspecified time and described his distress over the artificial leg incident. *Id*. ¶ 75. Defendant Molyneux promised to look into the situation and respond. *Id.* Apparently, Molyneux did not contact the plaintiff again. *Id.*

III. Analysis

The thirteen counts of the complaint will be discussed individually *infra*. Because only five of these counts are asserted against defendants Roney and the law firm of Lambert, Coffin, Rudman & Hochman, while all counts are asserted against all of the other defendants, the motion to dismiss on behalf of Roney and the law firm will be addressed first.

A. Defendants Roney and the Law Firm

Counts I, III, V, VI and VII are asserted against Defendant Roney. Count I asserts claims under 42 U.S.C. §§ 1981, 1983, 1985 and 1988; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*; the due process and equal protection provisions of the federal and Maine constitutions; the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A *et seq.*; the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*; the Maine Fair Credit Extension Act, 5 M.R.S.A. § 4595 *et seq.*; and 32 M.R.S.A. § 205-A, a nonexistent section of the Maine statutes. Count III seeks injunctive relief. Count V alleges intentional infliction of emotional distress and violation of 9-B M.R.S.A. § 161 *et seq.*, which prohibits the disclosure of financial records by a fiduciary institution. Count VI alleges negligent infliction of emotional distress and also invokes 9-B M.R.S.A. § 161 *et seq.* Count VII alleges invasion of privacy.

The complaint specifically mentions defendant Roney only in the following instances. Paragraph 8 of the complaint alleges that Roney wrote a letter to another lawyer, a copy of which is Exhibit C to the complaint. Paragraph 22 of the complaint alleges that Roney was across the table from the plaintiff at a meeting at which the plaintiff cried out in pain and lowered his head to the table; when the plaintiff looked up, defendant Hagemann looked at Roney and smirked. Paragraph 38 alleges that Roney acted in concert with the other defendants and conspired to deny the plaintiff due process and equal protection. These are the only specific allegations concerning Roney. There are many allegations in the complaint alleging activity by unspecified defendants, but such indefinite assertions are insufficient to state a claim against Roney.

The receipt of a smirking glance is insufficient as a matter of law to establish a claim of intentional or negligent infliction of emotional distress. There is nothing in Roney's letter that serves as the basis for such claims or for a claim of invasion of privacy. In addition, it is apparent from the complaint that Roney acted at all relevant times as the attorney for Key Bank of Maine. A lawyer is

not liable to third parties for the performance of his duties as an advocate absent evidence of collusion. *DiPietro v. Boynton*, 628 A.2d 1019, 1025 (Me. 1993). Therefore, the only specific allegation that might be pursued against Roney is that of conspiracy with the other defendants to deprive the plaintiff of certain constitutional rights. However, I conclude in my analysis of Count I *infra* that the complaint fails to state a claim upon which relief may be granted against any of the defendants on this basis, and Roney is therefore entitled to dismissal of that claim as well. Absent any substantive claim against Roney, the claim for injunctive relief raised against him in Count III must also fail. Roney is entitled to dismissal of all claims raised against him individually in the complaint.

The complaint asserts no causes of action against the firm of Lambert, Coffin, Rudman & Hochman independent of the claims against Roney, its associate. Because Roney is entitled to dismissal of all claims asserted against him, the law firm is also entitled to dismissal.

B. Remaining Defendants

1. Waiver and Release.

The first argument raised by the defendants, including Roney and the law firm, is that all of the claims in this action are barred by a release included in the workout agreement. The relevant language in the agreement provides:

> 4. Release of Lender:
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> (a) Each Borrower hereby remises, covenants not to sue, releases, acquits, waives and forever discharges and relieves Key and all of its parents, subsidiaries, and affiliates, and its officers, directors, agents, attorneys and employees of each in their capacities as such (hereinafter referred to as "Releasees"), of, from, regarding, and/or on account of any and all rights, benefits, interest, liabilities, claims, demands, actions, causes of action, suits, debts, covenants, obligations, accounts due, contracts, rights to payment, damages, lost profits, costs, fees, counterclaims, attorneys' fees, interest, penalties, offset, setoff, losses and claims and defenses of any nature and kind whatsoever, whether at law, equity or in administrative proceedings,

> whether at common law (tort, contract or other theory) or pursuant to federal, state or local statute, rule, ordinance or regulation, whether vested or contingent, whether known or unknown, whether liquidated or unliquidated, whether matured or unmatured, whether disputed or undisputed, which such Borrower ever had, now has, or which may result from the existing, past or present state of things, from the beginning of the world to the date hereof, related in any way to the Obligations, the Loan Documents, the Collateral, or the relationship between Key as creditor and Borrowers as debtors.

Workout Agreement, Exh. B to Complaint, at 3-4. The plaintiff responds, without citation to authority, that the bank's alleged breach of the workout agreement bars enforcement of this waiver and, relying on section 195 of the Restatement (Second) of Contracts, that a term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on public policy grounds.

The workout agreement states on its face that it is integrated.

> 18. Entire Agreement; No Modification. This Agreement and the Loan Documents (and the documents specifically contemplated hereby and thereby) comprise the entire agreement and understanding among the parties hereto and thereto and supersede all other negotiations, discussions, understandings or statements between the parties as the subject matter hereof and thereof. No other representations or warranties of any kind are given other than those specifically set forth in the foregoing. This Agreement may not be altered or modified orally or in any other manner other than by agreement in writing signed by all parties.

Workout Agreement at 13-14. The only specific breaches alleged by the plaintiff are of the bank's undertakings "to supply regular payment schedules, to return the Stipulated Judgment [sic], and to negotiate in good faith," Complaint, ¶ 54, and "by demanding and collecting excessive payments beyond the six month period outlined in the Workout Agreement," *id*. ¶ 6. The workout agreement does not obligate Key Bank of Maine to supply regular payment schedules, to negotiate in good faith, or to refrain from collecting payments of any kind after the six month period. Key Bank's only obligations are to forbear from enforcing its right to seek full payment on the mortgage at the time of the execution of the workout agreement and to return the stipulation to judgment at the end of six

months if all payments required of the borrowers under the agreement are made and the borrowers are not in default at that time.

The pending motion is one to dismiss, and materials outside the pleadings may not be considered. Based on the pleadings, and inasmuch as the plaintiff has alleged a breach of the bank's undertaking to return the stipulation to judgment under certain circumstances, enforcement of the waiver included in the workout agreement to dismiss this action or any of the claims asserted in this action would violate the basic principle of contract law that a failure of one party to render performance due under a contract excuses further performance by the non-breaching party. Restatement (Second) of Contracts § 237 (1976). Under the circumstances of this case, the effectiveness of the waiver can only be determined by resort to matters outside the pleadings.

In addition, the complaint does allege an intentional tort in Count V and the waiver does not address conduct occurring after the execution of the workout agreement.[4] For all of these reasons, it will be necessary to address each of the substantive claims raised in the complaint individually.[5]

2. Count I.

This count raises claims under the Rehabilitation Act of 1973; 42 U.S.C. §§ 1981, 1983, 1985 and 1988; the Maine Unfair Trade Practices Act; the Maine Human Rights Act; the Maine Fair Credit Extension Act; and the Maine Fair Debt Collection Practices Act.

Section 794 of Title 29, otherwise known as section 504 of the Rehabilitation Act, prohibits

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[4] Moreover, the plaintiff's claim under the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A *et seq.*, cannot be waived. 5 M.R.S.A. § 214.

[5] Paragraphs 1 and 34 of the complaint mention the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, as a basis for the plaintiff's claims. However, none of the thirteen counts mentions the Act, nor does the plaintiff's opposition to the motion to dismiss. Under these circumstances, any claim under the Act has been waived. *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990).

discrimination against a qualified individual with a disability, solely by reason of that disability, by any program or activity receiving federal financial assistance. The complaint does not allege that any of the defendants is receiving such assistance. Accordingly, the defendants are entitled to dismissal of any claims raised under the Rehabilitation Act. *See, e.g., McDonald v. Commonwealth of Massachusetts*, 901 F. Supp. 471, 477-78 (D. Mass. 1995) (defendant's receipt of federal financial assistance is element of cause of action under 29 U.S.C. § 794).

Section 1981 of Title 42 prohibits purposeful racial discrimination in the formation and enforcement of contracts. *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77 (1989). The complaint does not allege that any discrimination directed toward the plaintiff was based on his race. Allegations based on references to disability or handicap alone, without any reference to race, fail to state a claim upon which relief may be granted under section 1981. *Duncan v. AT&T Communications, Inc.*, 668 F. Supp. 232, 235 (S.D.N.Y. 1987). The defendants are entitled to dismissal of any claims raised under 42 U.S.C. § 1981.

Section 1983 of Title 42 establishes liability for deprivation of any rights, privileges or immunities secured by the federal constitution and laws by a defendant acting under color of state law. The defendants argue that the plaintiff cannot establish that they were acting under color of state law in the actions or failures to act that form the basis of the complaint. The plaintiff responds that the defendants were acting under color of state law because they were "attempting to foreclose on Plaintiff's home using the default action and 14 M.R.S.A. § 6231, et seq." Plaintiff's Response and Opposition to Defendants' Motion to Dismiss ("Plaintiff's Response") (Docket No. 17) at 18. However, neither compliance with nor enforcement of state statutes alone qualifies a private defendant as a state actor. *Benjamin v. Aroostook Med. Ctr.*, 937 F. Supp. 957, 970 (D. Me. 1996). "A private entity's conduct is not actionable under section 1983 if the challenged action results from the exercise

of private choice and not from state influence or coercion." *Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 492 (1st Cir. 1996). The plaintiff does not allege that the state compelled the defendants to attempt to foreclose when he defaulted on his mortgage loan. A defendant's choice to employ procedures made available by statute simply does not constitute state action for purposes of section 1983. *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980) (participation by private party in litigation does not constitute state action for purposes of section 1983); *Davis v. Richmond*, 512 F.2d 201, 202-05 (1st Cir. 1975) (restraint of plaintiff's possessions by defendants under state statute allowing boardinghouse keepers to do so did not constitute deprivation of civil right under color of state law). The defendants are entitled to dismissal of any claims raised under section 1983.

Section 1985 of Title 42 provides a cause of action, *inter alia*, to a plaintiff injured in his person or property by an act in furtherance of a conspiracy between two or more persons to deprive the plaintiff of equal protection of the laws. The complaint must allege that the challenged conduct resulted from an invidiously discriminatory class-based animus. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). Status as a disabled or handicapped individual, the only basis for discrimination alleged in the complaint, is not sufficient to state a claim under section 1985. *See Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176-77 (10th Cir. 1983). Accordingly, the defendants are entitled to dismissal of claims raised under section 1985 by this complaint.[6]

Count I of the complaint also mentions "title VII of the Civil rights Act of 1964" in its caption

[6] Count I also invokes 42 U.S.C. § 1988, which provides the courts with authority to award attorney fees to plaintiffs who prevail in actions under sections 1981, 1983 and 1985, among others, and expert witness fees to plaintiffs who prevail in actions under sections 1981 and 1981a. Section 1988 could only be applicable to this action if a claim were stated under section 1981, 1983, or 1985. Since the defendants are entitled to dismissal of all such claims, any claims under section 1988 must be dismissed as well.

but fails to specify the specific section of this Act under which a claim is raised. I am unable to discern from the complaint any claim that is raised under Title VII, which is found at 42 U.S.C. § 2000e *et seq*. and deals with equal employment opportunity. The defendants are entitled to dismissal of any such claim.

The plaintiff also asserts a claim in Count I under the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A *et seq*. A private cause of action is available under the Act to

> [a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 207 or by any rule or regulation issued under section 207 . . . .

5 M.R.S.A. § 213(1). The plaintiff contends that he is entitled to bring this action because he is a purchaser of property, the mortgaged residence, and services, the mortgage and loan servicing, from the defendants. Plaintiff's Response at 21. First, the complaint does not allege that the plaintiff purchased the mortgaged property from any of the defendants, as opposed to obtaining a mortgage to pay for the purchase. Next, his claim that he is a purchaser of services does not extend to any of the individual defendants or the law firm defendant. Indeed, the claim does not extend to any defendant other than Key Bank of Maine, the only entity from which he obtained a mortgage. He does not allege that he paid anything to any other bank defendant, so there can be no purchase from any entity other than Key Bank of Maine. Ultimately, the claim against Key Bank of Maine must also fail. The giving of a mortgage to a bank in return for money with which property is purchased is simply not the purchase of a service. The bank's servicing of the loan is an internal procedure adopted by the bank, and not a service which the person obtaining the mortgage chooses to purchase. All of the defendants are entitled to dismissal of any claims under the Maine Unfair Trade Practices Act.

Count I also asserts a claim under 5 M.R.S.A. § 4595, which provides:

> The opportunity for every individual to be extended credit without discrimination solely because of any one or more of the following factors: Age; race; color; sex; marital status; ancestry; religion or national origin is recognized as and declared to be a civil right.

The only basis of discrimination alleged in the complaint is the plaintiff's disability or handicap. This is not one of the grounds set forth in section 4595. The defendants are entitled to dismissal of any claims based on this statute.

Count I also generally invokes the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.* However, the Act only prohibits discrimination based upon disability or handicap in employment, 5 M.R.S.A. § 4571, housing, 5 M.R.S.A. § 4581, and public accommodations, 5 M.R.S.A. § 4591, none of which is implicated by the allegations contained in the complaint. The defendants are entitled to dismissal of any claims based on the Maine Human Rights Act.[7]

Finally, Count I asserts a claim under sections 11013 and 11054 of the Maine Fair Debt Collection Practices Act, which provide a private cause of action against a debt collector who harasses, oppresses or abuses a plaintiff in connection with the collection of a debt. The statute specifically exempts from the definition of a debt collector any officer or employee of a creditor while collecting debts for that creditor and any attorney collecting a debt on behalf of a client. 32 M.R.S.A. § 11003(1) & (6). Thus, none of the individual defendants may be held liable on this claim. The definition of a debt collector also excludes the bank defendants in this case:

> "Debt collector" means any person conducting business in this State, the

[7] In addition, the acts of discrimination of which the plaintiff complains appear to have occurred more than two years before the filing of the complaint in June 1997, beyond the period of the applicable statute of limitations, 5 M.R.S.A. § 4613(2)(C), as the defendants contend. Memorandum of Law in Support of Defendants' Motion to Dismiss ("Defendants' Memorandum") (included in Docket No. 15) at 6.

> principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or asserted to be owed or due another.

32 M.R.S.A. § 11002(6). Here, the bank defendants are not alleged, nor could they be, either to have as their principal purpose the collection of debts or to regularly collect debts owed to third parties. The statute does not apply to these defendants.[8]

For the foregoing reasons, the defendants are entitled to dismissal of Count I.[9]

3. Counts II and III.

Count II seeks imposition of a constructive trust. Count III seeks injunctive relief. Because these counts seek only certain forms of relief, rather than stating substantive claims, they will be addressed later in this recommended decision, after all substantive counts have been discussed.

4. Count IV.

Count IV alleges breach of contract, specifically breaches of the workout agreement and other alleged oral agreements, against the bank defendants and the bank employee defendants. First, the individual employee defendants cannot be liable for breach of a contract to which they are not named parties. *Mueller v. Penobscot Valley Hosp.*, 538 A.2d 294, 299 (Me. 1988). The individual defendants are therefore entitled to dismissal of the claims asserted against them in Count IV. Second, the only defendant that is a party to the workout agreement is Key Bank of Maine. Thus, Key Bank USA, N.A. and KeyCorp are entitled to dismissal of any claims arising out of breach of that contract. The complaint does raise a claim upon which relief may be granted as to Key Bank of Maine by asserting

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[8] Even if the Fair Debt Collection Practices Act were applicable to one or more of the defendants, the one-year statute of limitations on such claims, 32 M.R.S.A. § 11054(4), has expired, as the defendants contend. Defendants' Memorandum at 7.

[9] Count I also asserts a violation of 14 M.R.S.A. § 704-A, but that statute only establishes the jurisdiction of Maine courts over certain persons. It does not create a cause of action.

its failure to comply with a specific term of that agreement, *to wit*, the requirement that it return the stipulation to judgment to the plaintiff. The defendants argue that they were not required to return the stipulation because the plaintiff himself defaulted under the terms of the workout agreement, but that is a factual matter outside the pleadings and may not be used to support a motion to dismiss.

The other specific allegations of breach raised in Count IV concern an alleged agreement to supply regular payment schedules and an agreement to negotiate in good faith. Complaint ¶ 54. The former agreement could only be between the plaintiff and Key Bank of Maine, the only defendant to whom the plaintiff alleges that he was making payments. Construed most favorably to the plaintiff, the complaint does state a claim for such a breach. However, the latter "agreement" is not alleged in the complaint as an agreement at all, but rather as a duty of the bank defendants to their customer. It does not provide the basis for a breach of contract claim. Accordingly, Key Bank USA, N.A. is also entitled to dismissal of Count IV, and Key Bank of Maine is entitled to dismissal of any breach of contract claim based upon an alleged failure to negotiate in good faith.

5. Count V.

Count V alleges intentional infliction of emotional distress. Like Counts II, VI and VIII, it also alleges violation of 9-B M.R.S.A. § 161 as a basis for relief. That section supplies definitions for 9-B M.R.S.A. § 162, which provides that a fiduciary institution may not disclose to any person, except to a customer or his authorized agent, any financial records relating to that customer, with certain exceptions. None of the individual defendants is a "fiduciary institution" as that term is defined at 9-B M.R.S.A. § 161(1)(A), and any claim for relief based upon section 162 against an individual defendant therefore fails to state a claim upon which relief may be granted. The bank defendants do fall within the statutory definition, but the complaint contains no allegations capable of being construed to allege a violation of section 162. The only allegations that may be construed to mention the plaintiff's

financial records refer to the handling or examination of such documents by employees of the defendant banks, and the statutory scheme provides an express exception for such activity. 9-B M.R.S.A. § 161(2)(A). The defendants are entitled to dismissal of all claims based on 9-B M.R.S.A. § 161 *et seq.*

Under Maine law, a defendant is liable for intentional infliction of emotional distress "if he intentionally or recklessly inflicts severe emotional distress upon another by engaging in extreme or outrageous conduct." *Rubin v. Matthews Int'l Corp.*, 503 A.2d 694, 699 (Me. 1986). It is for the court to determine whether the conduct alleged may reasonably be regarded as so extreme and outrageous as to permit recovery. *Id.* The conduct identified in Count V of the complaint is (i) the refusal of the plaintiff's request for a delay in the March 1995 meeting due to problems with his prosthesis, the threats to foreclose on his defaulted mortgage if he did not attend the meeting, and the "mockery" of his disability by defendant Hagemann, Complaint ¶¶ 20, 57-59, and (ii) the plaintiff's inability to locate any employee of the bank defendants to respond to his questions and requests, *id*. ¶ 59. The complaint alleges that the defendants took these actions due to "arrogance and pique" related to the plaintiff's "raising legitimate defenses against Key Bank in a prior action." *Id.* While the alleged conduct concerning the meeting may well have caused the plaintiff distress, with one exception it was not so extreme and outrageous "as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community.'" *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979) (citation omitted). The failure to return telephone calls or the expression of confusion about the plaintiff's payments by various employees of the bank defendants clearly falls short of the critical point at which a claim for intentional infliction of emotional distress might be sufficiently pleaded to withstand a motion to dismiss.

The exception is the alleged ridicule of the plaintiff's physical disability by defendant

Hagemann. There is no sense in which any of the individual defendants or the law firm could be liable for this activity by Hagemann. Construing the allegations in the complaint favorably to the plaintiff, a claim for intentional infliction of emotional distress has been stated based on the conduct of Hagemann, who was an employee of Key Bank of Maine at the time. *See* Defendants' Memorandum at 4. The possibility of *respondeat superior* liability for Hagemann's action makes it impossible to dismiss this claim against defendant Key Bank of Maine. All other defendants are entitled to dismissal of Count V.

6. Count VI.

Again invoking 9-B M.R.S.A. § 161, the plaintiff alleges negligent infliction of emotional distress in Count VI. The complaint essentially repeats the facts alleged as grounds for a claim of intentional infliction of emotional distress in Count V. Complaint ¶¶ 62-63. As discussed above, 9-B M.R.S.A. § 162 does not provide a cause of action for the plaintiff under the circumstances of this case. In order to recover on a claim for negligent infliction of emotional distress, a plaintiff must prove that the defendant owed a duty of care to the plaintiff. *Devine v. Roche Biomedical Lab., Inc.*, 637 A.2d 441, 447 (Me. 1994). The plaintiff does not suggest any legal basis for his claim that the bank defendants had a legal duty not to express surprise at finding his payments, not to wonder what to do with his payments, or to return his telephone calls. The defendants are entitled to dismissal of any claims for negligent infliction of emotional distress based on these activities. Similarly, the defendants' alleged refusal to reschedule the meeting did not violate any legal duty. The defendant had defaulted in payments on his mortgage, and accordingly the bank had no legal duty to refrain from foreclosure proceedings.

The alleged conduct of defendant Hagemann was clearly intentional and therefore does not also provide a basis for a claim of negligent infliction of emotional distress.

All defendants are entitled to dismissal of Count VI.

7. Count VII.

Count VII of the complaint alleges, in conclusory fashion, that the defendants invaded the plaintiff's privacy. Under Maine law, a plaintiff may recover damages for an unauthorized intrusion upon his physical and mental solitude or seclusion. *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 795 (Me. 1976). There are four kinds of invasion of privacy:

> (1) intrusion upon the plaintiff's physical and mental solitude or seclusion;
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> (2) public disclosure of private facts;
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> (3) publicity which places the plaintiff in a false light in the public eye;
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> (4) appropriation for the defendant's benefit or advantage of the plaintiff's name or likeness.

Id. The facts alleged in the complaint cannot be construed to constitute the first, third or fourth of these alternatives. The allegation that the defendants insisted that the plaintiff attend a scheduled meeting even after learning that he would have to attend without his prosthesis does not constitute a "public disclosure" of the fact that the plaintiff has lost a leg. The complaint alleges that people who knew the plaintiff saw him without his prosthesis. Complaint ¶ 58. It does not allege that the plaintiff had always kept secret the fact that he had lost a leg. The defendants could not have known when they insisted upon the meeting as scheduled that the plaintiff would encounter others in the course of his travel to the meeting who knew him but did not know that he used a prosthesis. The complaint fails to allege the elements of an invasion of the plaintiff's privacy, and the defendants are entitled to dismissal of Count VII.

8. Count VIII.

Count VIII alleges fraud. Maine law requires that the circumstances constituting fraud be

pleaded with particularity. M. R. Civ. P. 9(b). The particular allegations of fraud included in the complaint are (i) that the defendants "failed to advise the Plaintiff that [they] had no intention of adhering to the Workout Agreement;" (ii) that the defendants did not communicate with the plaintiff "to offer some relief from the continual and excessive payments;" (iii) that defendant Burgess had no intention of keeping his promise to look into the plaintiff's complaints and get back to him; (iv) that the defendants abused the confidence placed in them by the plaintiff; and (v) that defendant Molyneux promised to look into "the artificial leg incident" and promised the plaintiff a response, although he "never intended to follow through and was not telling the truth." Complaint ¶¶ 70-73, 75.

A defendant is liable for fraud under Maine law if he

> (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

Tobin v. Casco N. Bank, N.A., 663 A.2d 1, 2 (Me. 1995), quoting *Grover v. Minette-Mills, Inc.*, 638 A.2d 712, 716 (Me. 1994). A failure to disclose rising to the level of misrepresentation is established by proof of either active concealment of the truth or a specific relationship imposing on the defendant an affirmative duty to disclose. *Id.*

The first instance pleaded in this section of the complaint is a restatement of the breach-of-contract claim and not a claim of fraud. Similarly, the fourth instance restates the claims made later in the complaint concerning breach of fiduciary duties and implied covenants and does not state a claim of fraud. The second alleged instance includes no false representation. To the extent that this claim is based on an alleged failure to disclose the fact that the bank would not provide any further funds to the plaintiff, the complaint establishes that the plaintiff did not rely on any such concealment. In fact, he sought the funds elsewhere. Complaint ¶ 18. The third and fifth alleged instances involve

false representations, but neither is material to the debtor-creditor relationship between the plaintiff and the bank that gives rise to this action, and neither resulted in monetary damage to the plaintiff. Pecuniary loss is a necessary element of a claim for fraud. *See* Restatement (Second) of Torts § 525 (1976).

Count VIII fails to state a claim upon which relief may be granted. The defendants are entitled to dismissal of this count.

9. Counts IX, X and XII.

These counts allege breach by the bank defendants of a fiduciary duty, a confidential relationship, an implied covenant of trust and confidence, and a covenant of good faith and fair dealing. Count XII also alleges as a basis for recovery violations of 5 M.R.S.A. §§ 205-A and 214. The defendants assert that a bank has no fiduciary duty running to a borrower, nor does it have "a duty of good faith to act in a commercially reasonable manner" towards a borrower. Defendants' Memorandum at 11. They merely assert that "the facts of this case do not support" the remaining claims of breach set forth in these counts. *Id*. at 16-17.

Under Maine law, fiduciary and confidential relationships are legal equivalents in terms of the duties and benefits that characterize them. *Reubsamen v. Maddocks*, 340 A.2d 31, 36 (Me. 1975); *Reid v. Key Bank of S. Maine, Inc.*, 821 F.2d 9, 16 n.4 (1st Cir. 1987).

> The salient elements of a confidential relation are the actual placing of trust and confidence in fact by one party in another and a great disparity of position and influence between the parties to the relation.

Ruebsamen, 340 A.2d at 35. The complaint alleges in conclusory fashion that the plaintiff placed trust and confidence in the bank, *e.g.*, Complaint ¶ 73, but it does not allege any disparity of position.[10]

[10] The plaintiff does make such an allegation in his response to the motion to dismiss. (continued...)

"[A] general allegation of a confidential relation is not a sufficient basis for establishing the existence of one." *Ruebsamen*, 349 A.2d at 35. The complaint fails to allege "a relationship going beyond the ordinary bank/customer situation," *Reid*, 821 F.2d at 17, with the "letting down of all guards and bars" by the plaintiff, *Reubsamen*, 340 A.2d at 35, and as a result fails to allege the existence of a confidential relationship giving rise to a fiduciary duty, *Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 605 A.2d 609, 614-15 (Me. 1992). The defendants are entitled to dismissal of Count IX.

The plaintiff does not identify the source of the alleged "implied covenant of trust and confidence" that provides the basis for Count X. The terms of the complaint in Count X do not differ significantly from those alleging breach of fiduciary duty in Count IX and breach of contract in Count IV. *Compare* Complaint ¶¶ 82-83 *with* ¶¶ 15, 78-80. Because the allegations in Count X are simply duplicative of other claims set forth in the complaint, the defendants are entitled to dismissal of Count X. *See Martin v. Afflerbach*, 623 F. Supp. 565, 566 (D. Me. 1985).

Count XII alleges a breach of the covenant of good faith and fair dealing. The defendants argue that they acted in good faith toward the plaintiff and that, in any event, a bank has no duty of good faith running to a borrower, as opposed to customers involved with deposits and collections. Defendants' Memorandum at 11-12. The former assertion is a matter of fact not appropriate for consideration in connection with a motion to dismiss. The latter statement is incorrect.

In its most recent statement concerning the covenant of good faith and fair dealing in a relationship between a bank and a borrower, the Maine Law Court held that "the more onerous duty of objective good faith" is limited by the Uniform Commercial Code to issues of bank deposits and collections. *Diversified Foods*, 605 A.2d at 613. The court also held, however, that a duty of good

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[10](...continued)
Plaintiff's Response at 23. This assertion, however, does not remedy the defect in the complaint.

faith, requiring "honesty in fact in the conduct or transaction concerned," is imposed by the Uniform Commercial Code on transactions between banks and business borrowers. Nothing in the opinion suggests that such a duty may not be implied when the borrower seeks financing for a residence instead of a business. Read favorably to the plaintiff, the complaint alleges a failure by Key Bank of Maine and Key Bank USA, N.A. to employ honesty-in-fact while dealing with him. No such claims are raised against KeyCorp, and the individual defendants are not liable for the alleged breach by their employer. The defendants other than Key Bank of Maine and Key Bank USA, N.A. are therefore entitled to dismissal of Count XII's claims of breach of covenant.

To the extent that Count XII also alleges violations of the Maine Unfair Trade Practices Act, I have already concluded that the defendants are entitled to dismissal of such claims.

10. Count XI.

Count XI alleges conversion by the defendants of unspecified records and of payments in excess of those due on the mortgage. Conversion is the invasion of a person's possession or right to possession. *Bradford v. Dumond*, 675 A.2d 957, 962 (Me. 1996). The defendants argue that the terms of the workout agreement entitle them to retain the plaintiff's payments and records. Defendants' Memorandum at 17. However, as noted above in my discussion of the defendants' argument that all of the plaintiff's claims are barred by the terms of the workout agreement, the defendants may not rely upon the terms of the workout agreement, which the complaint alleges they have breached, as the basis for dismissal, because failure of one party to render performance under a contract excuses further performance by the non-breaching party. Restatement (Second) of Contracts § 237. The defendants provide no other argument for dismissal of this count.

This claim may not be asserted against the individual employee defendants, who are not personally liable for the acts of their employer. In addition, the complaint cannot be construed to

allege that any defendant other than Key Bank of Maine holds property rightfully belonging to the plaintiff. Accordingly, all defendants other than Key Bank of Maine are entitled to dismissal of Count XI.

11. Count XIII.

In Count XIII of his complaint the plaintiff reiterates claims under the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A *et seq.*, and the Maine Fair Debt Collection Practices Act, 32 M.R.S.A. § 11001 *et seq*. As noted in my discussion of Counts I and XII above, the defendants are entitled to dismissal of these claims.

The complaint also alleges in Count XIII a violation of Article 22-A of the General Business Law of New York. N. Y. Gen. Bus. Law § 349(a) provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." Section 349(h) creates a private right of action under the statute for injunctive relief and damages up to $1,000. The complaint also mentions this New York statute in the caption of Count I.

The defendants do not argue that New York law is not applicable under the circumstances of this case. It is not necessary to reach that issue in any event because private actions under section 349 must plead injury to the public generally, not just to the plaintiff. *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 173 F.R.D. 74, 77 (W. D. N.Y. 1997). "Private contract disputes, unique to the parties, . . . would not fall within the ambit of the statute." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 647 N.E.2d 741, 744 (N. Y. 1995). Here, the plaintiff alleges no general injury to the public but rather a dispute unique to the parties. The defendants are therefore entitled to dismissal of any claims brought under the New York statute.

12. Remedies.

In Count II the plaintiff seeks imposition of a constructive trust. In Count III he seeks injunctive relief. Both of these counts seek remedies that are available if liability is established on a cause of action. Neither count is an assertion of an independent legal claim. The plaintiff also seeks punitive damages on all counts other than Counts II, III, and XIII. Complaint at 27-28.

If my recommended decision is adopted by the court, the only claims remaining upon which the plaintiff may obtain relief are breach of contract and breach of the covenant of good faith and fair dealing against Key Bank of Maine and Key Bank USA, N.A., conversion against Key Bank of Maine, and intentional infliction of emotional distress against defendants Hagemann and Key Bank of Maine. My consideration of the requested relief will be limited to those claims.

a. Constructive Trust

> A constructive trust may be imposed when a party holding legal title to property stands in a fiduciary relation to another, resulting in an "equitable duty to convey [the property] on the ground that he would be unjustly enriched if he were permitted to retain it."

Thomas v. Fales, 577 A.2d 1181, 1182-83 (Me. 1990), quoting Restatement of Restitution § 160 (1937). The plaintiff's claims based upon an alleged fiduciary relationship in this matter are subject to dismissal and as a result there is no basis for imposition of a constructive trust under Maine law. In addition, the relief available on the legal claims for conversion and breach of contract that are not subject to dismissal is adequate to protect the plaintiff's interests, making the equitable relief sought in this count unnecessary and thus unavailable. The defendants are entitled to dismissal of Count II.

b. Injunctive Relief

Count III seeks both preliminary and permanent injunctive relief. A party seeking such relief must show, *inter alia*, that he is subject to continuing irreparable injury for which there is no adequate remedy at law. *Lopez v. Garriga*, 917 F.2d 63, 68 (1st Cir. 1990). The defendants assert that the

complaint does not allege irreparable harm and that the legal remedies available to the plaintiff are adequate.

Some of the specific injunctive relief requested by the plaintiff exceeds the bounds of his remaining claims, *i.e.*, Complaint ¶ 51(B) & (C), and the remaining requested relief is available on his legal claims, *id.* (A) & (D). Insofar as the complaint seeks either permanent or interim injunctive relief, adequate remedies at law are available on the remaining counts of the complaint.

c. Punitive Damages

In Maine, punitive damages are available where a defendant's tortious conduct is motivated by malice toward the plaintiff, or where deliberate conduct by a defendant is so outrageous that malice toward a person injured as a result of that conduct will be implied. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). Punitive damages are not available for breach of contract. *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989). The allegations in the complaint concerning the alleged conversion by Key Bank of Maine do not rise to the level of conduct so outrageous that malice may be implied. Only the claim of intentional infliction of emotional distress against Hagemann and Key Bank of Maine states a claim upon which it might be possible for the plaintiff to establish an entitlement to punitive damages.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **GRANTED** altogether on Counts I - III, VI - X, and XIII; **GRANTED** as to defendants KeyCorp; Lambert, Coffin, Rudman & Hochman; Roney; Burgess and Molyneux on all other counts; **GRANTED** as to defendant

Hagemann on all counts but Count V; **GRANTED** as to defendant Key Bank USA, N.A. on all counts but Count XII; **GRANTED** as to defendant Key Bank of Maine on all counts but Counts IV, V, XI, and XII; **GRANTED** as to all claims for punitive damages except on Count V; and otherwise **DENIED**. If the court adopts my recommended decision, remaining for further proceedings will be Count IV against Key Bank of Maine; Count V against defendants Hagemann and Key Bank of Maine, but only as to the alleged ridicule of the plaintiff due to his disability; Count XI against Key Bank of Maine; and Count XII against defendants Key Bank of Maine and Key Bank USA, N.A.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of March, 1998.

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David M. Cohen
United States Magistrate Judge